MENTERI HAL EHWAL DALAM NEGERI & ANOR.

v.

LEE GEE LAM AND ANOTHER CASE

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA),
TAN SRI DATO' HAJI MOHD. AZMI BIN DATO' HAJI KAMARUDDIN SCJ,
DATUK WIRA L.C. VOHRAH J.
[CRIMINAL APPEAL NO. 05-18-93/05-19-93]
15 OCTOBER 1993

PREVENTIVE DETENTION: Detention orders issued against respondents - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1) - Respondents applications for writs of habeas corpus allowed - Appeal against decision of High Court.

The Deputy Minister of Home Affairs had issued detention orders in respect of the two respondents. The High Court allowed the respondents applications for writs of *habeas corpus* on the grounds that the detention of the respondents were defective due to non-compliance with the provisions of s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (the Act).

On appeal, it was argued by the learned SFC that since the grounds for the detention in the two detention orders were the reproduction of the exact words found in s. 4(1) of the Act with the use of the word "or" distinguishing the ground relating to public order under the first limb from that relating to suppression of violence under the second limb, it did not matter whether the detention was made on the first ground or the second ground because the grounds upon which the detention was made constituted not a question of procedure but a question of substance which came solely within the subjective discretion of the Deputy Minister.

Counsel furhter argued that the learned Judicial Commissioner should have treated one of the grounds as immaterial surplusage without having the effect of invalidating the order.

Held:

[1] The learned Judicial Commissioner was correct in allowing the respondents' applications for *habeas corpus* because on the face of it the order was vague as to whether the Deputy Minister had actually applied his mind to the particular circumstances of each respondent's case or whether he had exercised his power of detention mechanically.

[2] In determining the propriety or legality of a detention order under s. 4(1) of the Act, the satisfaction of the Minister has to be considered in the light of the limbs under which he acted. The determination of the question as to whether he addressed his mind to the relevant limb or for that matter to both the limbs in making his detention order is a procedural matter and if it is shown that there is some doubt as to which particular limb the Minister applied his mind to or whether he applied his mind to both the limbs together in grounding his order, the benefit of the doubt must be given to the detenu.

[Appeals dismissed].

[Bahasa Malaysia Translation of Headnote]

PENAHANAN PENCEGAHAN: Perintah penahanan terhadap responden - Ordinan (Ketenteraman Awam dan Pencegahan Jenayah) Darurat 1969, s. 4(1) - Permohonan responden untuk writ habeas corpus dibenarkan - Rayuan terhadap keputusan Mahkamah Tinggi.

Timbalan Menteri Kementerian Dalam Negeri telah mengeluarkan perintah penahanan berhubung dengan kedua-dua responden. Mahkamah Tinggi telah membenarkan permohonan pihak responden untuk writ *habeas corpus* atas alasan bahawa penahanan para responden adalah tidak sempurna kerana tidak mematuhi peruntukan s. 4(1) Ordinan (Ketenteraman Awam dan Pencegahan Jenayah) Darurat 1969 (Akta tersebut).

Atas rayuan, telah dihujahkan oleh Peguam Kanan Persekutuan bahawa memandangkan alasan-alasan bagi penahanan di dalam kedua-dua perintah penahanan merupakan betul-betul penghasilan semula akan perkataan-perkataan yang yang didapati di dalam s. 4(1) Akta tersebut dengan penggunaan perkataan "atau" membezakan alasan yang berhubung dengan ketenteraman awam di bawah bahagian pertama daripada yang berhubung dengan penindasan keganasan di bawah bahagian kedua, tidak menjadi hal sama ada penahanan tersebut dibuat atas alasan pertama atau alasan kedua kerana alasan atas mana penahanan tersebut dibuat tidak membawa persoalan prosedur tetapi persoalan substans yang tergolong

dalam lingkungan budibicara subjectif Timbalan Menteri.

Diputuskan:

[1] Persuruhjaya Kehakiman yang bijaksana tersebut adalah betul dalam membenarkan permohonan para responden untuk *habeas corpus* kerana dari segi luarannya perintah tersebut adalah samar-samar berhubung dengan sama ada Timbalan Menteri telah sebenarnya mengambil dalam ingatan akan keadaan-keadaan yang tertentu dalam setiap kes responden atau sama ada beliau telah mengamalkan kuasa penahanan beliau secara mekanikal.

[2] Dalam menentukan kewajaran dan keesahan di sisi undang-undang akan sesuatu perintah penahanan di bawah s. (4) Akta tersebut, kepuasan hati Menteri berkenaan perlu dipertimbangkan memandang kepada bahagian-bahagian di bawah mana beliau bertindak. Penentuan persoalan berhubung dengan sama ada beliau ada mengambil ingatan kepada kerelevanan bahagian atau kepada kedua-dua bahagian dalam membuat perintah penahanan adalah merupakan suatu perkara prosedur dan jika ditunjukkan terdapat sebarang keraguan berhubung dengan bahagian mana Menteri mengambil ingatan atau sama ada beliau ada mengambil ingatan kepada kedua-dua bahagian secara bersama dalam mengemukakan alasan beliau untuk perintah yang dikeluarkan oleh beliau, faedah keraguan perlulah diberikan kepada detinu.

[Rayuan ditolak].

Cases referred to:

Lim Thian Hock @ Lim Thiam Hock, Re & 10 Ors. v. Minister of Home Affairs & Anor.[1992] 4 CLJ 2289 / [1992] 1 MLJ 214 ***(foll)***

Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor. [1991] 2 CLJ 1199 / [1991] 3 MLJ 28 ***(foll)***

Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor. [1990] 2 CLJ 4 / [1990] 2 MLJ 297 ***(foll)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)

For the appellant - Hamid Embong, SFC (Mahmud Abdullah, FC with him)

For the respondent - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

L.C. Vohrah J:

These were two identical appeals against the decision of the learned Judicial Commissioner Vincent Ng Kim Khoay in allowing the respondents' applications for *habeas corpus* on the common ground that the respective orders issued by the Deputy Minister of Home Affairs for the detention of the respondents were defective due to non-compliance with the provisions of s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

The order in respect of each of the respondents was made by the Deputy Minister on the same day in identical terms on almost similar facts. Each of the two orders was in the following terms:

> BAHAWASANYA saya, Menteri Dalam Negeri berpuashati yang Perintah ini adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan hendak mencegah beliau daripada melakukan perbuatan dengan apa-apa cara yang memudaratkan ketenteraman awam atau untuk menghapuskan kekerasan atau mencegah jenayah yang melibatkan kekerasan.
>
> Nama — Nombor Kad Pengenalan
>
> [x] — [x]
>
> Oleh yang demikian, pada menjalankan kuasa yang diberi kepada saya di bawah s. 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, maka saya mengarahkan dengan perintah ini supaya orang yang namanya tersebut di atas ditahan selama dua tahun mulai dari 22 April 1992, di Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang atau di mana-mana tempat lain sebagaimana yang diarah dari semasa ke semasa.
>
> Ditandatangani pada 22 April 1992
>
> t.t.
> (Dato' Megat Junid Bin Megat Ayob)
> Timbalan Menteri Dalam Negeri,
> Malaysia

Section 4(1) of the Ordinance is worded as follows:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence

that that person should be detained, the Minister shall make an order (hereinafter referred to as a "detention order") directing that that person be detained for any period not exceeding two years.

The learned Judicial Commissioner in allowing the two applications for *habeas corpus* adopted the reasons he gave in a previous hearing when he considered 11 criminal applications jointly, namely *Lim Thian Hock @ Lim Thiam Hock, Re & 10 Ors. v. Minister of Home Affairs & Anor.* [1992] 1 MLJ 214 wherein he stated (at p. 219):

> ... it seems quite clear to me that what is intended in s 4(1) of the Ordinance is to confer on the Minister the power to issue a detention order based on any one of two grounds which, by its very nature of expression, should be read disjunctively.
>
> The first limb of the section seeks to allow the Minister to detain:
>
> (a) a person who has acted in any manner prejudicial to public order (or, presumably social order in our society), which encompasses a whole gamut of variegated offences such as smuggling, running illegal lotteries, preaching religious heresy, or advocating communist or racist ideology, all of which do not necessarily involve violence; and
>
> The second limb allows the Minister to detain:
>
> (b) a person, if it is necessary for the suppression of violence or the prevention of crimes involving violence, obviously an appropriate provision for curbing gangsterism, gangland warfare and gang violence - which necessarily involve violence or the use of violence, as emphasised in the second limb.
>
> Furthermore, the interpolation in s 4(1) of the Ordinance, of the following words (underscored by me) "... **it is necessary that that person should be detained** or that it is necessary for ... **that that person should be detained** ..." (seemingly repetitive) shows a clear recognition by the legislature of the distinction between the first and second limb of the said section.
>
> The two above grounds for detention in (a) and (b) are so distinct and different *in specie* one to the other, that reading them conjunctively does not make for grammatical sense or consistency in the flow of the language ... There being nothing in the Ordinance requiring that the detention order should be in any particular form, the order should be so worded as to show, at least on its face, under which particular limb of s. 4(1) the detenu is being detained.
>
> Compliance with this essential and mandatory procedure is necessary in order to dispel the view that the order was vague or was passed mechanically by merely reproducing the language of s 4(1) of the Ordinance. Such matters are subject to the scrutiny of the courts though, it is settled that once ground (a) or (b) (or even both with the conjunction "and" used) is selected by the Minister, his subjective satisfaction as to manner of such selection and the allegations of fact to back-up same is beyond question by the courts by virtue of s. 7C of the Ordinance (s. 11C of the Act).

Before us the learned Senior Federal Counsel for the appellants whilst conceding that there are two limbs to s 4(1) challenged the decision of the learned Judicial Commissioner by arguing that since the grounds for the detention in the two detention orders were the reproduction of the exact words found in s. 4(1) with the use of the preposition "or" distinguishing the ground relating to public order under the first limb from that relating to suppression of violence under the second limb, it should not have mattered whether the detention was made on the first ground or the second ground because (if we understood him correctly) the grounds upon which the detention was made constituted not a question of procedure but a question of substance which came solely within the subjective discretion of the Deputy Minister. In any event, he argued, the learned Judicial Commissioner should have treated one of the grounds as immaterial surplusage without having the effect of invalidating the order.

In this regard, we were alerted by Counsel for the respondent to a well-considered judgment of the High Court, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* [1991] 3 MLJ 28, wherein Edgar Joseph Jr. J. (as he then was), in allowing the detenu's application for *habeas corpus* had this to say (at pp.29 to 30):

> There had been a consistent current of judicial opinion in our courts, including the latest decisions of the Supreme Court, which indicate that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so as to require that the provisions of the relevant statute are rigidly and meticulously complied with. (See for example, *Tan Hoon Seng v. Minister of Home Affairs, Malaysia*

& Anor. [1990] 1 MLJ 171, *Rajoo s/o Ramasamy v. Inspector General of Police & Ors.* [1990] 1 CLJ 888, and a series of 11 recent appeals heard together, the first being *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* [1990] 2 MLJ 297, in all of which the detainee succeeded on purely procedural or technical grounds).

We were of the view that the above observations of the learned Judicial Commissioner and those of the learned Judge reflect the correct attitude of the Courts in interpreting provisions relating to the exercise of the power of detention without a trial. The learned Judicial Commissioner was correct in allowing the respondents' applications, for *habeas corpus* because on the face of it the order was vague as to whether the Deputy Minister had actually applied his mind to the particular circumstances of each respondent's case or whether he had exercised his power of detention mechanically. As was stated by this Court in the case of *Poh Chin Kay (supra)* at p.299:

> ... The power to detain a person without trial cannot be exercised by inference. The power must be expressed, clear and unequivocal. Where detention law and the liberty of the individuals *(sic)* are concerned, this is the most correct approach for the courts to apply. There is hardly any need to repeat what has been said on the principle to be followed by the courts in dealing with detention law. The principle was emphasized in *Re Tan Boon Liat @ Allen & Anor.* [1977] 2 MLJ 108, at p. 114 reiterated by this court in *PP v. Koh Yoke Koon* [1988] 2 MLJ 301 and *Tan Hoon Seng v. Minister of Home Affairs, Malaysia & Anor.* [1990] 1 MLJ 171.

We would conclude by saying that in determining the propriety or legality of a detention order made under s. 4(1) the satisfaction of the Minister has to be considered in the light of the limbs under which he acted. The determination of the question as to whether he addressed his mind to the relevant limb or for that matter to both the limbs in making his detention order is a procedural matter and if it is shown that there is some doubt as to which particular limb the Minister applied his mind to or whether he applied his mind to both the limbs together in grounding his order, the benefit of the doubt must be given to the detenu.

For the above reasons, the two appeals had to be dismissed.

NATIONAL LAND FINANCE CO-OPERATIVE SOCIETY LTD.

v.

DIRECTOR GENERAL OF INLAND REVENUE

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA),
TAN SRI DATO' HAJI MOHD AZMI BIN DATO' HAJI KAMARUDDIN SCJ,
DATUK WIRA L.C. VOHRAH J.
[CIVIL APPEAL NO. 506 OF 1987]
10 NOVEMBER 1993

REVENUE LAW: Whether the words of the amendment made by Act A471 of 1980 to paragraph 33 of Schedule 9 of the Income Tax Act 1967 was capable of removing the exemption from tax granted to the tax payer by s. 13(1)(f)(ii) of the Income Tax Ordinance 1947.

The appellant, being a society registered under s. 7 of the Co-operative Societies Ordinance 1948, was exempted from paying income tax under s. 13(1)(f)(ii) of the Income Tax Ordinance 1947. On repeal of the Ordinance, the exemption was continued by paragraph 33 of Schedule 9 of the Income Tax Act 1967 (the Act). The Revenue, contending that the amendment to the proviso to the said paragraph 33 by Act A471 of 1980 had removed the exemption and made the amendment retrospective to the year of assessment 1968, raised assessments afresh on the tax payer for the years of assessment 1977 to 1981.

The Special Commissioners of Income Tax discharged the assessments raised holding that the amendment to paragraph 33 of Schedule 9 of the Act did not have the effect of removing the exemption from tax. On appeal by the Revenue, the High Court held that the tax payer no longer enjoyed the exemption by virtue of the said amendment and reversed the decision of the Special Commissioners. The tax payer appealed further.

Held:

[1] It was clear that the tax payer had an acquired right to exemption from tax under the Income Tax Ordinance 1947 when the Act came into force. That acquired right, which was confirmed by the Special Commissioners of Income Tax in Case No. PKR 256, should only be overruled prospectively and not retrospectively.